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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
SEATTLE DIVISION

UNITED STATES of AMERICA,	)	
	)	
Plaintiff,	)	Cause No. CR-11-120-JCC
	)	
-vs-	)	
	)	<b>MOTION TO MODIFY TERM OF</b>
MICHAEL MURPHY,	)	<b>IMPRISONMENT PURSUANT TO</b>
	)	<b>18 U.S.C. § 3582(C)(1)(A)(i)</b>
Defendant.	)	
	)	
	)	

COMES NOW Michael Murphy, by and through his counsel of record, and  
hereby moves this Honorable Court for its Order modifying Mr. Murphy's term of

1 imprisonment to time served. Mr. Murphy makes the motion because at 72 years  
2 of age, he is at substantial risk of suffering severe consequences if he were to  
3 contract Covid-19, and his performance in prison demonstrates that under the 18  
4 U.S.C. 3553(a) factors he should be released. He is not a danger to the public, he  
5 is no longer in need of rehabilitation having earned a college degree while  
6 incarcerated, and the eight plus years he has spent in federal custody are sufficient  
7 to promote respect for the law, provide deterrence and punish Mr. Murphy.  
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10 Counsel for the Government, Mr. Lombardi, has been contacted regarding  
11 this motion and opposes it.  
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### 13 RELEVANT FACTS

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15 Mr. Murphy was convicted in this Court of Conspiracy to Distribute  
16 Controlled Substances and Conspiracy to Commit Money Laundering on March  
17 23, 2012, and was sentenced to a prison term of 144 months followed by a  
18 supervised release term of 5 years. He is currently projected to be released on July  
19 27, 2022, meaning that as of this writing, he has served 103 months, with 21  
20 months to go, or 83% of his sentence.  
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23 Mr. Murphy has been anything but idle during his time in prison. He has  
24 completed dozens of classes while in prison, everything from Accounting and  
25 International Business to Landscape Design, Creative Writing, and Introduction to  
26 Japanese. He made the Dean's list and completed an Associates Degree. Mr.  
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1 Murphy also worked, had no disciplinary issues, and was entrusted repeatedly with  
2 being on his own outside the prison. Documents supporting these activities are  
3 attached.  
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5 Mr. Murphy is still classified as an inmate, though he was moved from  
6 imprisonment at FPC Yankton, S.D. to the Residential Reentry Management  
7 (RRM) field office because of Covid-19, and lives courtesy of a generous friend in  
8 his friend's home in California wearing an ankle monitor. The living situation  
9 protects Mr. Murphy for the time being, but is tenuous at best. The Bureau of  
10 Prisons could return him to literal custody at any time, and/or Mr. Murphy's  
11 friend's generosity could (understandably) run out at some point, requiring Mr.  
12 Murphy's return to custody. Finding another place to live would be particularly  
13 challenging for Mr. Murphy. He no longer has connections in the Seattle area, and  
14 while he would prefer to reside in Montana to be near his daughter – and would be  
15 able to do so if he were on supervised release – because there is no Bureau of  
16 Prisons RRM in Montana that is not an option for him.  
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22 A return to prison would almost undoubtedly expose Mr. Murphy to the  
23 virus and likely cause him to catch the disease it carries. As of this writing the  
24 Bureau of Prisons has tested 68,668 prisoners, with 17,137 testing positive.  
25 <https://www.bop.gov/coronavirus/>, That is a positivity rate of just short of 25%.  
26  
27 The World Health Organization (WHO) recommends that countries which have  
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1 “introduced large scale public health and social measures (PHSM)” not relax them  
2 until the positivity rate reflected in testing drops below 5% for 14 straight days.

3 [https://www.who.int/publications/i/item/public-health-criteria-to-adjust-public-](https://www.who.int/publications/i/item/public-health-criteria-to-adjust-public-health-and-social-measures-in-the-context-of-covid-19)  
4 [health-and-social-measures-in-the-context-of-covid-19](https://www.who.int/publications/i/item/public-health-criteria-to-adjust-public-health-and-social-measures-in-the-context-of-covid-19). And there is no reason to  
5 expect the incidence of infection to go down soon. Yesterday the United States  
6 saw nearly 90,000 new cases in a single day, part of a sharp upward trend that sets  
7 new records every day and shows no sign of abating.

8 <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

9  
10 Moreover, within that picture of raging cases, prisons are even worse. With  
11 prisoners sharing living, eating, and hygiene facilities, “Covid-19 cases are  
12 proportionally higher and have spread faster in prisons than in the outside  
13 population, said Brendan Saloner, an associate professor at Johns Hopkins  
14 Bloomberg School of Public Health, who is studying the issue.”

15 [https://www.washingtonpost.com/nation/2020/08/24/prisoners-guards-agree-about-](https://www.washingtonpost.com/nation/2020/08/24/prisoners-guards-agree-about-federal-coronavirus-response-we-do-not-feel-safe/)  
16 [federal-coronavirus-response-we-do-not-feel-safe/](https://www.washingtonpost.com/nation/2020/08/24/prisoners-guards-agree-about-federal-coronavirus-response-we-do-not-feel-safe/). Those conclusions are only  
17 underscored by a review of one BOP facility (Lompac) by the DOJ Inspector  
18 General which reported that “In response to the working draft of this report, the  
19 BOP stated that maintaining adequate levels of medical staff in BOP institutions  
20 was an ongoing nationwide challenge.” The report also noted insufficient regular  
21 staff, insufficient masks and PPE and untimely use of what there was, insufficient  
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1 screening, and a lack of institutional communication and leadership.

2 <https://oig.justice.gov/sites/default/files/reports/20-086.pdf>.

3 The novel corona virus and its accompanying disease, Covid-19, seem  
4 surely to be with us for the foreseeable future, even assuming a successful vaccine  
5 is just around the corner. When asked if he thought we could be past Covid-19 by  
6 2022, Dr. Anthony Fauci, head of the National Institute for Allergy and Infectious  
7 Diseases, had the following to say:  
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11 "I don't think we're going to eradicate it.

12 We may not completely eliminate it, but if you get it down to such a very  
13 low level, and enough of the population is protected — either by a vaccine  
14 or by previously having been infected — then you'll develop a degree of  
15 herd immunity that you won't have an outbreak.

16 So when people say spring of 2022, I think that's quite reasonable, because I  
17 think that if we deploy a vaccine and we implement public health measures,  
18 I think it might even be sooner than that. But 2022 I think is a pretty good  
19 bet.”

20 [https://www.businessinsider.com/fauci-interview-how-to-stay-healthy-get-by-until-](https://www.businessinsider.com/fauci-interview-how-to-stay-healthy-get-by-until-2022-2020-9)

21 [2022-2020-9](https://www.businessinsider.com/fauci-interview-how-to-stay-healthy-get-by-until-2022-2020-9). That means that we can expect the United States to be substantially  
22 recovered from this pandemic only about the time Mr. Murphy is scheduled to be  
23 released from prison anyway.  
24

25 If Mr. Murphy were returned to prison and caught the virus, he would be in  
26 serious danger. The United States Centers for Disease Control (CDC) reports that  
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1 for men of his age (71), there is a substantial increase in both deaths and  
2 hospitalizations from Covid-19. Persons in the 65-74 age group, for instance (Mr.  
3 Murphy's age group), are at a 5 times higher risk for hospitalization, and a  
4 whopping 90 times greater risk of death than a person in the 18-29 age group.  
5 [https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html)  
6 [discovery/hospitalization-death-by-age.html](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html). It is notable, also, that Mr. Murphy,  
7 at 71 is on the higher end of the 65-74 age-group. The next higher age group, 74-  
8 84 is at 8 times higher risk of hospitalization and 220 times higher risk of death,  
9 than the comparison group, 18-29 year-olds. Although Mr. Murphy is in good  
10 health for a man his age, it is not unreasonable to estimate that he has around a 7  
11 times greater likelihood of being hospitalized with Covid-19 and around a 200  
12 times greater chance of dying if he catches Covid-19 than if he were in his  
13 twenties.  
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## 20 ARGUMENT

21 Under 18 U.S.C. § 3582(c)(1)(A)(i) a district court may modify an inmate's  
22 time of incarceration if there are "extraordinary and compelling reasons" that  
23 warrant it. Either the Bureau of Prisons (BOP) or the inmate may file the motion,  
24 but if the BOP refuses to file motion or ignores a request from the inmate to file,  
25 the inmate may file directly in the district court. Many courts around the country  
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1 have concluded in light of Covid-19 and the BOP's general failure to respond to  
2 inmate requests for motions, that the requirement to exhaust administrative  
3 remedies can and should be waived. *See, e.g. Abdallah v. United States, E.D.*  
4 *Virginia, 4:15-cr-18(3), June 4, 2020*, holding that all three exceptions to the  
5 exhaustion requirement – futility, inadequate relief, and undue prejudice -- apply to  
6 3582(c)(1)(A) motions during the Covid crisis, and gathering cases. The statistics  
7 continue to bear out the *Abdallah* court's conclusion. The Bureau of Prisons has  
8 received over 10,000 requests to move for release and has rejected or not  
9 responded at all to over 98% of them.

10 [https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-](https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied)  
11 [prisoners-sought-compassionate-release-98-percent-were-denied](https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied). Moreover, Mr.  
12 Murphy because he is in the limbo state of being an inmate out of prison, there is  
13 no longer a “warden” to go to as the statute requires. Given that the BOP is  
14 inundated with cases among their staff as well as their inmates, it is perhaps  
15 understandable that they have not been able to process these requests. In light of  
16 Mr. Murphy's status and the reality of the BOP's responses, though, this Court  
17 should waive the 30-day requirement and consider Mr. Murphy's motion.

18 Under the statute prisoners may be released if “extraordinary and compelling  
19 reasons warrant such a reduction.” 18 U.S.C. § 3582(C)(1)(A)(i). The sentencing  
20 guidelines offer a definition of “extraordinary and compelling reasons” that

1 includes a catch-all provision that provides that a court may reduce the sentence if  
2 “there exists in the defendant's case an extraordinary and compelling reason other  
3 than, or in combination with, the reasons described in subdivisions (A) through  
4 (C). USSG § 1B1.13, note 1(D). Without such a catch-all provision a prisoner yet  
5 to catch a deadly disease would not be able to escape that future – a punishment far  
6 greater than contemplated by his sentence – in the unlikely event of something like  
7 a global pandemic.  
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11 That unlikely event, of course, is exactly what is happening now, an event  
12 not seen on this planet in a hundred years. Indeed, it is hard to imagine anything  
13 more “extraordinary” and “compelling” than a once-every-hundred years event  
14 which has in the space of less than 9 months has become the third leading killer of  
15 Americans, and is far from over. Many commentators have noted that this is a  
16 time when all people must take heightened responsibility for their own health and  
17 the health of their communities. That is all Mr. Murphy asks when he seeks  
18 reduction of his sentence – an opportunity in the face of a pandemic to protect  
19 himself and be with his loved ones.  
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24 Finally the statute requires that an inmate seeking sentence reduction meet  
25 be amenable to release after consideration of the sentencing factors in 18 U.S.C.  
26 3553(a). That part is easy. With respect to the nature of the offense, Mr. Murphy  
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1 never had a substantial role in the distribution, serving only as a “driver” of  
2 marijuana going one direction and money going the other. Notably, in today’s  
3 world transportation of marijuana is no longer even illegal under many  
4 circumstances, and Mr. Murphy has already served a substantial sentence for his  
5 actions. The sentence served also provides just punishment, promotes respect for  
6 the law, and arguably over-reflects the seriousness of the crime, at least as  
7 society’s view of that crime has evolved since Mr. Murphy’s conviction. 8 years  
8 behind bars is surely an adequate deterrent, there is no need to protect the public  
9 from Mr. Murphy as he is not and has never been a danger to the public, and he has  
10 exhausted practically every opportunity for rehabilitation that has been available to  
11 him. Indeed, if the goal of the statute is truly to promote respect for the law,  
12 releasing Mr. Murphy far better serves that goal than keeping him incarcerated  
13 does.  
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20 Quite simply, there is no good reason for Mr. Murphy to be behind bars. It  
21 does not serve the public, it does not serve the concept of “justice,” it does not  
22 serve Mr. Murphy. Mr. Murphy respectfully asks this Court to apply 18 U.S.C. §  
23 3582(C)(1)(a)(i) and reduce his sentence to time served.  
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26 DATED this 30<sup>th</sup> day of October, 2020.  
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/S/ Joshua S. Van de Wetering  
Joshua S. Van de Wetering  
Attorney for Defendant/Petitioner

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of October, 2020, a copy of the foregoing document was served on the following persons by the means indicated below:

CM/ECF

1-2

1. Clerk, U.S. District Court
2. Vince Lombardi, United States Attorneys Office

/S/ Joshua S. Van de Wetering  
Joshua S. Van de Wetering  
Attorney for Defendant